Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-864

BIAGIO J. PERRELLO, PETITIONER

v.

THE INDIANA SUPREME COURT DISCIPLINARY COMMISSION

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

NO._____

BIAGIO J. PERRELLO, Petitioner

v.

THE INDIANA SUPREME COURT DISCIPLINARY COMMISSION, Respondent

---

PETITION FOR A WRIT OF CERTIORATI TO THE SUPREME COURT OF INDIANA

The petitioner Biagio J. Perrello respectfully prays that a writ of certiorari issue to review the order of the Supreme Court of Indiana which temporarily suspends him from the practice of law.

OPINION BELOW

The opinion of the Supreme Court of Indiana has not appeared in the official state reports. It appears unofficially at 380 N.E.2d 72 and is attached hereto as Appendix A.

JURISDICTION

The judgment of the Supreme Court of Indiana was entered on September 13, 1978. On September 25th, petitioner filed a motion to review that judgment. He withdrew that motion on September 29th, and filed a motion for stay of enforcement pending the filing of this petition for a writ of certiorari. On November 3, 1978, the Indiana Supreme Court approved the withdrawal of petitioner's motion for review of its judgment, but denied his motion for a stay of enforcement. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

QUESTIONS PRESENTED

Whether the procedures specified by Indiana Supreme Court Rule A.D. 23, infra,

violate the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States. Specifically, (1) whether the Supreme Court of Indiana can constitutionally shift the burden of proof to the petitioner in a disciplinary proceeding and require him to prove that he should not be temporarily suspended from the practice of law, and (2) Whether Indiana Supreme Court Rule A.D. 23, denies the petitioner Due Process of Law because it fails to provide standards defining the basis for a temporary suspension from the practice of law.

INDIANA SUPREME COURT RULE INVOLVED

Indiana Supreme Court Rule A.D. 23, Sec 14(g), provides in pertinent part:

> "...Procedure at the hearing upon such rule to show cause shall be the same as provided herein for hearing upon the complaint and answer, except the burden of proof shall be upon the respondent..."

The remaining portions of Indiana Supreme Court Rule A.D. 23 which pertain to this case are attached hereto as Appendix B.

STATEMENT OF THE CASE

On June 12, 1978, the Indiana Supreme Court Disciplinary Commission filed its verified complaint against the petitioner. On that same date, the Commission also filed a Motion for Suspension Pending a Final Determination on the Complaint under Indiana Supreme Court Rule A.D. 23, Sec. 11(c). On July 17th, petitioner filed his answer to the complaint and motion, and raised the same two constitutional questions presented in this petition.

The Disciplinary Commission's Motion for Temporary Suspension was called for trial trial on August 11, 1978, and petitioner was specifically told that since he had the burden of proof he should present his case in chief first. Petitioner rested without presenting any evidence. The Commission introduced the Oath of Attorneys signed by the petitioner and a transcript of the November 1977 hearing that resulted in his reinstatement after a prior suspension. No other evidence was introduced.

On August 17th, the Hearing Officer issued his findings of fact, one of which was that the petitioner had "wholly failed to meet the burden of proof" under Indiana Supreme Court Rule A.D. 23, Sec. 14(g).

He also found that the facts alleged by the Disciplinary Commission in its verified complaint constituted violations of the Code of Professional Responsibility and supported the Motion for a Rule to Show Cause. He recommended suspension pending a final determination of the merits of the Commission's complaint by the Supreme Court. On September 13, 1978, the Supreme Court issued its order adopting the Hearing Office's findings of fact and suspended the petitioner from the practice of law. The temporary suspension is currently in effect.

REASONS FOR GRANTING THE WRIT

This Court has held that "an attorney's calling or profession is his property within the true sense and meaning of the constitution...", Ex Parte Wall, 107 U.S. 265, 268, 2 S.Ct. 569, 27 L.Ed. 552 (1882), and that disbarment, while designed to protect the public, is a punishment imposed upon the lawyer, In re Ruffalo, 390 U.S. 544, 550, 88 S.Ct. 1222, 20 L.Ed.2d 117 (1968). In several recent cases, the Court has held that the Due Process Clause of the Fourteenth Amendment governs the laws and procedures for

admission to the practice of law and the discipline of attorneys. See, generally, Konigsburg v. State Bar of California, 353 U.S. 252, 77 S.Ct. 722, 1 L.Ed.2d 810 (1957), Willner v. Committee on Character and Fitness, 373 U.S. 96, 83 S.Ct. 1175, 10 L.Ed.2d 224 (1963), In re Ruffalo, supra, and cases cited therein.

One of the most important procedural factors in determining the outcome of a trial is the allocation of the burden of proof. Armstrong v. Manzo, 380 U.S. 545 85 S.Ct. 1187, 14 L.Ed.2d 62 (1965). There is absolutely no doubt that the state cannot place that burden on a criminal defendant, Mullaney v. Wilbur, 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975), and Patterson v. New York, 432 U.S. 197, 97 S.Ct. 2319, 53 L.Ed.2d 281 (1977), or on a defendant in a juvenile delinquency proceeding, In re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). Nor can it do so when a fundamental right such as free speech is at stake, Speiser v. Randall, 357 U.S. 513, 78 S.Ct. 1332, 2 L.Ed.2d 1460 (1958). The state cannot create presumptions that have the effect of shifting the burden of proof

to civil defendants, so that they must prove they were not negligent, Western & Atlantic Railroad Company v. Henderson, 279 U.S. 639, 49 S.Ct. 445, 73 L.Ed. 884 (1929), and it cannot condition a new trial on the defendant's ability to show that a judgment procured without notice to him would have been rendered on his behalf had he been notified, Armstrong v. Manzo, supra. The burden remains on the plaintiff in injunctive proceedings, Fox Valley Harvestore v. A.O. Smith Harvestore Products, 545 F.2d 1096 (7th Cir. 1976). In criminal contempts, which, like the instant case, involve the issuance of a "rule to show cause", the state has the burden of proof, regardless of the terminology. Michaelson v. U.S. ex rel. Chicago, St. Paul, Minneapolis & Omaha Railway Co., 266 U.S. 42, 45 S.Ct. 18, 69 L.Ed. 162 (1924), North American Coal Corporation v. United Mine Workers, 512 F.2d 238, 244 (6th Cir. 1975). The rule to show cause is merely a form of notice to the defendant. The same rule applies in civil contempts. Gompers v. Bucks Stove and Range Company, 221 U.S. 418, 31 S.Ct. 492, 55 L.Ed. 797 (1911).

The reasoning behind this prohibition on allocating the burden of proof to a defendant is clear, especially in penal proceedings such as this one. As this Court noted in Speiser v. Randall, supra:

> "There is always in litigation a margin of error, representing error in fact-finding, which both parties must take into account. Where one party has at stake an interest of transcending value -- as a criminal defendant his liberty -- this margin of error is reduced as to him by the process of placing on the other party the burden of producing a sufficiency of proof in the first instance, and of persuading the factfinder at the conclusion of the trial of his guilt beyond a reasonable doubt. Due Process commands that no man shall lose his liberty unless the Government has borne the burden of producing the evidence and convincing the factfinder of his guilt. Tot v. United States, 319 U.S. 463, 63 S.Ct. 1241, 87 L.Ed. 1519, supra." 357 U.S. at 525, 526.

Shifting the burden of proof to a defendant completely reverses the presumption that he is innocent until the

state proves him guilty, and this the state cannot do. Estelle v. Williams, 425 U.S. 501, 96 S.Ct. 1691, 48 L.Ed.2d 126 (1976), In re Winship, supra. As this Court noted in Taylor v. Kentucky, ___ U.S. ___, 98 S.Ct. 1930, 56 L.Ed.2d 468 (1978):

> "It is now generally recognized that the 'presumption of innocence' is an inaccurate, shorthand description of the right of the accused 'to remain inactive and secure, until the prosecution has taken up its burden and produced evidence and effected persuasion; i.e., to say in this case, as in any other, that the opponent of a claim or charge is presumed not to be guilty is to say in another form that the proponent of the claim or charge must evidence it.' J. Wigmore, supra. The principal inaccuracy is the fact that it is not technically a 'presumption' -- a mandatory inference drawn from a fact in evidence. Instead, it is better characterized as an 'assumption' that is indulged in the absence of contrary evidence..." 56 L.Ed.2d at 474, n. 12.

Where the standard of proof is a mere

preponderence of the evidence, as it is in the instant case, Indiana Supreme Court Rule A.D. 23, Sec. 14(f), the allocation becomes even more critical, Speiser v. Randall, In re Winship (concurring opinion of Mr. Justice Harlan), supra.

Petitioner has an "interest of transcending value", Speiser v. Randall, supra, analagous to that of a criminal defendant: his professional standing as a lawyer, his established clientele, his right to practice in his chosen profession, and his income, present and future, Ex Parte Wall, supra.

Petitioner's suspension from the practice of law pending a final determination on the merits is a prejudgment remedy similar to a preliminary injunction, a garnishment, or a writ of attachment. It goes beyond these extraordinary remedies, however, because the temporary relief is the same as the final relief: suspension from the practice of law. Indeed, if petitioner is ultimately found innocent of the charges, he will have suffered the same kind of penalty that he would suffer if he is found guilty, even though the duration of

the suspension may be different.

When injunctive relief is sought, the plaintiff bears the full burden of proving his entitlement to such an extraordinary remedy. He must show that he will be irreparably harmed if the injunction does not issue, that the threatened injury to him outweighs the harm the injunction will inflict on the defendant, and that he has a reasonable likelihood of success on the merits of his complaint. Some courts also require a showing that there is no adequate remedy at law and that the granting of the injunction will not disserve the public interest. Fox Valley Harvestore v. A.O. Smith Harvestore Products, supra. Prejudgment garnishments stand on the same footing. They are allowed because there is some danger that the property or money will be forever lost or damaged, and therefore beyond the plaintiff's reach at the conclusion of the lawsuit. Mitchell v. W.T. Grant Company, 416 U.S. 600, 94 S.Ct. 1895, 40 L.Ed.2d 406 (1974). There must generally be a showing of at least probable

cause for the garnishment. North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601, 95 S.Ct. 719, 42 L.Ed.2d 751 (1975). They differ only in the sense that prejudgment garnishments and attachments may be granted without notice to the defendant, and thus are more like temporary restraining orders than preliminary injunctions, at least at the initial stages of the proceedings.

The purpose of prejudgment relief is to preserve the court's ability to render a judgment after a trial on the merits, Canal Authority v. Callaway, 489 F.2d 567, 576 (5th Cir. 1974). Such relief has no relationship to punishment or reparation for past wrongs, United States v. Oregon State Medical Society, 343 U.S. 326, 333, 72 S.Ct. 690, 96 L.Ed. 978 (1952), and it is limited to preserving the subject matter of the lawsuit and to preventing any further erosion of the plaintiff's rights by maintaining the status quo. Furthermore, the defendant's rights must be protected; i.e., by requiring the plaintiff to post bond to cover damages if the defendant prevails on the merits, North Georgia Finishing, Inc. v. Di-Chem, Inc., supra.

The Indiana Supreme Court procedures for prejudgment suspensions have none of the safeguards required for preliminary injunctions and prejudgment garnishments and attachments. There are no requirements that the alleged misconduct be ongoing, that there be a likelihood of irreparable harm to the public, that the Disciplinary Commission has a probability of success on the merits, or that the harm to the petitioner will be less than the harm to the public if he is not suspended. None of these allegations were made or proven by the Disciplinary Commission in the instant case. Absent any of the safeguards that are essential in remedial prejudgment proceedings, the temporary suspension suit becomes a trial on the merits, and hence is punitive rather than remedial. The only real difference between the temporary suspension proceedings and the trial on the merits is the allocation of the burden of proof. Indiana Supreme Court Rule A.D. 23, Sec. 14(g), supra.

The second constitutional infirmity with the rule governing temporary suspensions is that it contains no

standards for determining which offenses would, "if proven, warrant suspension pending prosecution". Indiana Supreme Court Rule A.D. 23, Sec. 11(c), infra. The rule is completely silent on this matter, leaving the decision within the absolute discretion of the Disciplinary Commission, the hearing officer, and the Supreme Court. This licenses each of them to create their own standards in each case, Herndon v. Lowry, 301 U.S. 242, 57 S.Ct. 732, 81 L.Ed. 1066 (1937), and it encourages arbitrary and inconsistent results, Thornhill v. Alabama, 310 U.S. 88, 60 S.Ct. 736, 84 L.Ed. 1093 (1940). The rule likewise fails to give attorneys of ordinary intelligence any notice that their conduct might result in a prejudgment suspension, United States v. Harriss, 347 612, 74 S.Ct. 808, 98 L.Ed. 989 (1954), Bouie v. City of Columbia, 378 U.S. 347, 84 S.Ct. 1697, 12 L.Ed.2d 894 (1964), and Papachristou v. City of Jacksonville, 405 U.S. 156, 92 S.Ct. 839, 31 L.Ed.2d 110 (1972), and forces them to guess at its meaning and differ as to its application, Connally v. General Construction Company, 269 U.S. 385, 391,

46 S.Ct. 126, 70 L.Ed. 322 (1926). Nor does the rule advise an attorney what he must prove to avoid being suspended. It says only that he has the burden of proving that he should not be suspended, Indiana Supreme Court Rule A.D. 23, Sec. 14(g), without telling him what standards his evidence will be judged against.

Petitioner was thus denied any advance notice of the kinds of misconduct that warrant prejudgment suspension, he was denied any of the traditional safeguards required for preliminary injunctions and prejudgment garnishments and attachments, he was presumed guilty and required to prove that he should not be suspended, and he was denied any standards to assist him in preparing his proofs.

For these reasons, petitioner respectfully submits that the rule of the Indiana Supreme Court under which he is currently suspended from the practice of law violates his right to Due Process of Law under the Fourteenth Amendment to the United States Constitution. That rule is heavily and unconstitutionally weighted against the petitioner and in favor of the state and cannot be allowed to stand.

CONCLUSIONS

Based upon the above showing that petitioner has been substantially deprived of his Constitutional rights, a writ of certiorari should issue to review the judgment and opinion of the Supreme Court of Indiana in this cause.

Respectfully submitted,

William E. Marsh, Esq.

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M. Anne Wilcox, Esq.

CERTIFICATE OF SERVICE

I hereby certify that on this ____ day of November, 1978, three copies of this Petition for Writ of Certiorari were hand delivered to Mr. Sheldon Breskow, Esq., the Executive Secretary of the Indiana Supreme Court Disciplinary Commission, at his office, Room 814, I.S.T.A. Building, Indianapolis, Indiana 46204. I further certify that all parties required to be served have been served.

William E. Marsh, Esq.

APPENDIX A
OPINION BELOW

SUPREME COURT OF INDIANA
(NO. 678 S 105)

IN THE MATTER OF BIAGIO J. PERRELLO

ORDER OF SUSPENSION PENDING
FINAL DETERMINATION

Comes now the Disciplinary Commission of the Supreme Court and files "Motion for Suspension Pending Prosecution," which Motion appears more fully in words and figures as follows, to wit:

(H.I.)

And comes now the appointed Hearing Officer and, pursuant to Admission and Discipline Rule 23, Sec. 14(g), submits his written recommendation for suspension pending the determination of this cause.

This Court, being duly advised in the premises, now finds that, pursuant to Admission and Discipline Rule 23, Sec. 14(g), the Hearing Officer conducted a hearing on the Motion for temporary suspension and found that the Respondent

failed in his burden of proof of establishing why he should not be suspended from the practice of law pending the determination. Accordingly, this Court now further finds that the recommendation of the Hearing Officer should be accepted and approved.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED by this Court that the Respondent, Biagio J. Perrello, is hereby suspended from the practice of law in thie (sic) State pending final determination by this Court of the present cause.

DONE at Indianapolis, Indiana, this 13 day of September, 1978.

/s/ Richard M. Givan
Richard M. Givan
Chief Justice of Indiana

All Justices concur.

APPENDIX B

RELEVANT PORTIONS OF INDIANA

SUPREME COURT RULE A.D. 23

Indiana Supreme Court Rule A.D. 23, Sections 11(a), 11(b), and 11(c) provide:

"(a) The members of the Commission shall consider and make a determination of the report of the recommendations of the Executive Secretary ***

"(b) If after such consideration, the Commission determines there is reasonable cause to believe the respondent is guilty of misconduct which would warrant disciplinary action, it shall file with the Clerk a complaint ***

"(c) If after such consideration aforesaid, the Commission determines there is reasonable cause to believe respondent is guilty of misconduct which, if proven, would warrant suspension pending prosecution, it shall include a motion to that effect in the aforesaid report to this Court, and this Court shall so advise the hearing officer or officers."

Indiana Supreme Court Rule A.D. 23, Section 14(f) provides, in pertinent part:

"(f)...the hearing officers shall determine whether misconduct has been proven by a preponderence of the evidence..."

Indiana Supreme Court Rule A.D. 23, Section 14(g) provides, in pertinent part:

"(g) If there has been a determination of reasonable cause as set forth under 11(c), and if the complaint states facts constituting such reasonable cause, the hearing officer or officers may, upon motion of the disciplinary commission, issue a rule against the respondent to show cause why he should not be suspended pending final determination of the cause and fixing a time and place certain for hearing thereon, *** Procedure at the hearing upon such rule to show cause shall be the same as provided herein for hearing upon the complaint and answer, except the burden of proof shall be upon the respondent. If the respondent, in the opinion of the hearing officer or officers shall fail to sustain such

burden of proof, the hearing officer or officers shall submit to this Court a written recommendation whether or not the respondent be suspended pending final determination of the cause."

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ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

BRIEF FOR RESPONDENT IN OPPOSITION

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ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

BRIEF FOR RESPONDENT IN OPPOSITION

QUESTIONS PRESENTED

Petitioner's recital of the "Questions Presented" (Pet. pp. 2-3) overlooks the question of justiciability. This issue arises upon the "Findings and Recommendation of the Hearing Officer As To Suspension Pending Final Determination of the Cause" disclosing that Petitioner admitted the facts alleged in Respondent's Verified Complaint for Disciplinary Action. Although these "Findings and Recommendation of the Hearing Officer As To Suspension Pending Final Determination of the Cause" are an integral part

of the decision below they are omitted therefrom as copies in Petitioner's Appendix A, (unpaged) and herein supplied as Respondent's Appendix A, (pp. 1A-4A).

Except as modified by the foregoing, Respondent accepts Petitioner's statement of his "Questions Presented."

SUPPLEMENT TO PETITIONER'S STATEMENT OF THE CASE

(1)

Petitioner does not disclose that prior to the hearing on August 11, 1978 he had twice procured continuances and on August 11th sought a third continuance which was granted as to the hearing on the merits but denied as to the motion for pendente lite suspension. These facts, like his admissions, are disclosed by the omitted "Findings and Recommendation of the Hearing Officer As To Suspension Pending Final Determination of the Cause" (Appendix A, pp. 1A-3A).

(2)

Additionally, as shown by the Partial Transcript of the August 11, 1978 hearing (Appendix B, pp. 1B-10B), and the petition for suspension incorporating the complaint (Appendix C), Petitioner, previously suspended from the practice of law for a period of not less than two (2) years, reinstated and currently charged with repeating the same kind of misconduct admitted same in the face of Respondent's readiness to proceed to hearing. Also disclosed by Appendix C is the fact that no additional or different misconduct, than alleged in the Verified Complaint for Disciplinary Action, was relied upon to support the pendente lite motion for suspension, hence the grounds for suspension were the basic allegations in the Verified Complaint for Disciplinary Action.

(3)

The record discloses that Petitioner claim is not justiciable because his admissions put his case, pendente lite, in the category of an agreed case, or one presenting no issue of fact hence subject to a summary pendente lite judgment.

SUMMARY OF ARGUMENT

(1)

Petitioner asserts that Rule A.D. 23, Section 14(g) denies due process, hence is invalid, because it puts upon him the burden of proof in a hearing for pendente lite suspension. Respondent disagrees because the Rule prescribes, and Petitioner was given, the "opportunity to be heard." Also, that in this case, the question is abstract, hence not justiciable, due to Petitioner's admissions which eliminated any burden of proof.

(2)

Petitioner's assertion that Rule A.D. 23, Section 14(g) prescribes no standard for pendente lite suspension is not merely abstract. It is based upon fiction in this case, as disclosed by Appendix A, Petitioner's admissions are conclusive that he precisely knew the charges and was not surprised by any of them.

(3)

Petitioner's case, for certiorari, is based upon a fictional *might have been* theory and presents no justiciable controversy.

LAW ARGUMENT

(1)

This Court's Rule 8 permits, exparte, pendente lite suspension of an attorney "where it is shown . . . that any

member of its bar . . . has been guilty of conduct unbecoming a member of the bar of this court." Rule 8 affords the attorney "the opportunity to show good cause, within forty days, why he should not be disbarred."

Indiana's assailed Rule A.D. 23, Section 14(g) affords the charged attorney a hearing before pendente lite suspension. The opportunity to be heard is the extent of the prescription in the due process decisions even for disbarment, hence should suffice in this pendente lite suspension. *Selling, et al. v. Radford* (1916), 243 U.S. 46, 51: 61 L.Ed. 585, 587.

In *Willner v. Committee on Character and Fitness* (1963), 373 U.S. 96; 10 L.Ed.2d 224; 83 S.Ct. 1175, cited by Petitioner (Pet. p. 6) the due process issue turned upon notice and the right to be heard. The holding is most succinctly phrased in the concurring opinion of Mr. Justice Goldberg (joined by Justices Brennan and Stewart):

> The constitutional requirements in this context may be simply stated: in all cases in which admission to the bar is to be denied on the basis of character, the applicant, at some stage of the proceedings prior to such denial must be adequately informed of the nature of the evidence against him and be accorded an adequate opportunity to rebut this evidence. *As I understand the opinion of the Court, this does not mean that in every case confrontation and cross-examination are automatically required. It must be remembered that we are dealing, at the initial stage of proceedings, not with a court trial, but with a necessarily much more informal inquiry into an applicant's qualifications for admission to the bar.* The circumstances will determine the necessary limits and incidents implicit in the concept of a "fair" hearing. *Thus, for example, when the derogatory matter appears from information supplied*

> *or confirmed by the applicant himself,* or is an undisputed documentary character disclosed to the applicant, and it is plain and uncontradicted that the committee's recommendation against admission is predicated thereon and reasonably supported thereby, *then neither the committee's informal procedures, its ultimate recommendations, nor a court ruling sustaining the committee's conclusion may be properly challenged on due process grounds, provided the applicant has been informed of the factual basis of the conclusion and has been afforded an adequate opportunity to reply or explain.* Of course, if the denial depends upon info nation supplied by a particular person whose reliability or veracity is brought into question by the applicant, confrontation and the right of cross-examination should be afforded. Since admission to the bar is ultimately a matter for the courts, there is ample power to compel attendance of witnesses as required. (Emphasis added.)

This is precisely the case at bar; the initial stage was based upon information confirmed by Petitioner for the purposes, only, of the pendente lite motion.

(2)

Petitioner incorrectly asserts an absence of standards governing pendente lite suspension. Upon that predicate he argues that he *might have been* required to meet strange and new charges. Such was not his case nor does he assert it was.

Appendix C discloses that Rule A.D. 23, Section 14(g), is not invoked in the case at bar except upon the exact charges laid in the Verified Complaint for Disciplinary Action and which are clear, undeniable and manifesting a clear and total indifference to Indiana's *Code of Profes-*

sional Responsibility for Attorneys at Law. The case against Petitioner charges repetitive misconduct for which an attorney has been suspended and reinstated upon his immediately broken pledge to abstain. That the charges were clear; that he understood them is conclusively manifested by his admissions disclosed in Appendix A.

This Court will give "respectful consideration" to an administrative agency's valid interpretation of a rule rather than an invalid interpretation to which the rule is susceptible. *Law Students Research Council v. Wadmond* (1971), 401 U.S. 154, 162; 27 L.Ed.2d 749, 758; 91 S.Ct. 720.

We submit, however, that Rule A.D. 23, Section 14(g), is not logically susceptible to Petitioner's invalid interpretation. It prescribes "ancillary" relief which is always deemed to be subordinate to the basic claim. *Saunders v. Baltimore & Ohio R.R. Co.* (D.C. W.Va., 1945), 63 F.Supp. 705, 708.

Even absent notice and preliminary hearing lack of due process is not conclusively shown:

> But this does not mean that every order entered without notice and a preliminary adversary hearing offends due process. The adequacy of notice and hearing respecting proceedings that may affect a party's rights turns, to a considerable extent, on the knowledge which the circumstances show such party may be taken to have of the consequences of his own conduct. *Link v. Wabash R.R. Co.* (1962), 370 U.S. 626, 632; 8 L.Ed.2d 734, 739; 82 S.Ct. 115.

In Petitioner's case there was clearly adequate notice. There were also three opportunities to be heard after respondent had presented its case but which he himself aborted by procuring continuances.

(3)

We submit that Petitioner presents a rather ethereal, not his real, case. As such it is not justiciable.

"The exercise of judicial power under Article III of the Constitution depends on the existence of a case or controversy." *Preiser v. Newkirk* (1975), 422 U.S. 395, 401; 45 L.Ed. 272, 277; 95 S.Ct. 2330.

Petitioner's admissions obliterate any factual controversy; his repeated opportunities to be heard extends due process protection beyond the requirements of this Court's Rule 8.

This Court will not "render advisory opinions" "upon a hypothetical state of facts." *Preiser v. Newkirk,* supra.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a Writ of Certiorari should be denied.

Respectfully submitted,

s/ SHELDON A. BRESKOW
Executive Secretary

814 I.S.T.A. Building
150 West Market Street
Indianapolis, Indiana 46204
(317) 633-4454

Attorney for Respondent
Indiana Supreme Court
Disciplinary Commission

APPENDIX A

IN THE SUPREME COURT
OF THE
STATE OF INDIANA

IN THE MATTER OF
BIAGIO J. PERRELLO } SS:

CAUSE NO. 678-S-105

FINDINGS AND RECOMMENDATION OF THE HEARING OFFICER AS TO SUSPENSION PENDING FINAL DETERMINATION OF THE CAUSE

The undersigned, heretofore, appointed by this Honorable Court as Hearing Officer in the above entitled cause under the provisions of Admission and Discipline Rule 23, respectfully reports as follows:

PRELIMINARY PROCEEDINGS

1. On June 12, 1978, the Disciplinary Commission of this Court filed a Verified Complaint for Disciplinary Action with the Clerk of this Court, naming Biagio J. Perrello, an attorney practicing law in Indianapolis, Indiana, as the Respondent. On that same date the Commission filed a Motion for Suspension Pending Prosecution. Said Motion sought a show cause hearing to determine whether the Respondent should be suspended pending the final determination of this cause.

2. On June 15, 1978, the undersigned was appointed as Hearing Officer in this matter and assumed jurisdiction of the same.

3. On June 23, 1978, the undersigned filed an Order with the Clerk of this Court setting the cause for pre-trial conference on July 5, 1978 and for hearing on July 12, 1978.

4. On July 5 the parties met for pre-trial conference. The Commission was present by its Executive Secretary Sheldon A. Breskow, and the Respondent was present, in person, and represented pro se. At said conference the Respondent requested continuance of the July 12, trial date so that he could obtain counsel. Said request was granted. Whereby the undersigned set the show cause hearing on the Commission's motion for temporary suspension for July 26, 1978, and hearing on the Verified Complaint for August 11, 1978.

5. On or about July 22, 1978, the Respondent filed, pro se, a Motion for Continuance, seeking a postponement of the July 26 show cause hearing. Said motion was overruled by the undersigned.

6. On July 26, 1978, the aforementioned Show Cause hearing commenced at 9:00 a.m. in the Indiana Supreme Court Conference Room. Present were the undersigned, the Commission by counsel David Copenhaver and Thomas Opsut, and the Respondent, pro se. The Respondent stated that he had obtained counsel; however, counsel had informed him that morning that he could not be present. After due consideration, the undersigned continued the show cause hearing until August 11, 1978 and further stated that no more continuances would be granted to the Respondent grounded on his inability to obtain counsel.

7. On August 4, 1978, the Respondent by counsel Mr. Ralph Ogden, filed a Verified Motion for Continuance seeking a postponement of the proceedings scheduled for August 11. As grounds for said continuance Respondent's counsel cited inadequate preparation time to prepare for the final hearing on the merits.

8. The undersigned considered said motion and on August 7, 1978, entered the following order:

Respondent's verified Motion for Continuance is carefully considered.

The complaint and Motion in this cause were filed June 12, 1978. The Respondent is not a layman but an attorney who is familiar with these proceedings and the law in connection therewith.

Respondent's Motion for further continuance is denied. Dated this 7th day of August, 1978.

THE HEARING

1. On August 11, 1978 this cause came before the undersigned for a show cause hearing on the Commission's motion for Temporary Suspension and the final hearing on the merits. Said hearing convened at 9:00 a.m. in the Supreme Court Conference Room. Present were the undersigned, the Commission, by counsel, and the Respondent, in person and by counsel, Ms. Anne Wilcox and Mr. Ralph Ogden. Prior to the hearing of any evidence Respondent's counsel filed a motion that asked that the motion for continuance of the final hearing be reconsidered. After hearing argument of counsel the undersigned granted said motion and continued the hearing on the Verified Complaint to September 14, 1978.

2. The undersigned then directed that the parties proceed with the hearing on the Commission's Motion for Suspension pending final determination of the cause. The Respondent, by counsel orally moved for a continuance, and stated that they were unaware that this matter would be considered separately from the hearing on the Verified Complaint. Further, Respondent's counsel stated that they did not have enough time to prepare to meet the burden of proof as required under Ind. R. A.D. 23, Section 14(g).

3. The undersigned overruled said motion and ordered the parties to proceed to hearing.

4. The Respondent, by counsel's statement in open court, admitted all the factual allegations contained in Counts I and II of the aforementioned Verified Complaint. The Respondent claims that such actions did not violate the Code of Professional Responsibility. The Respondent then rested without offering evidence.

5. The Commission offered into evidence a copy of the Respondent's *Oath of Attorneys*. Said document was admitted without objection. The Commission then rested. The

undersigned took judicial notice of the Verified Complaint and the record in this cause.

FINDING OF FACT

The undersigned finds:

1. That the Respondent was duly notified of the aforementioned show cause hearing; further, he had ample time to prepare for said hearing and seek counsel to present evidence or assist.

2. That pursuant to Ind. R. A.D. 23, Section 14(g), the Respondent has wholly failed to meet the burden of proof in this matter.

3. That the facts alleged by the Commission in its Verified Complaint for Disciplinary Action and admitted by Respondent at said Show Cause hearing, do constitute violations of the *Code of Professional Responsibility for Attorneys at Law* and support the Petition for Temporary Suspension.

RECOMMENDATION

Pursuant to A.D. Rule 23, Section 14(g), I.C. Court Rules, Book 2, (1973), the undersigned recommends that this Court grant the Disciplinary Commission's *Motion for Suspension Pending Prosecution,* and the Respondent should be suspended from the practice of law in the State of Indiana until final determination of this matter by this Honorable Court.

Respectfully submitted,

s/ CARL G. WINTER
Hearing Officer and Judge

Dated: 8-16-78

APPENDIX B

THE COURT: I beg your pardon?

MS. WILCOX: We will proceed with the hearing today, as we do not feel we could refuse to proceed with that hearing. We rested only as to any continuation of any arguments on our motion that this temporary suspension hearing be rescheduled. We did not rest as to the presentation of any evidence.

THE COURT: Are you prepared to go ahead, then?

MS. WILCOX: We are not prepared, but we are willing to go ahead, Your Honor.

THE COURT: Let's go ahead. Call your first witness.

MR. OGDEN: Excuse me, just a moment, Your Honor.

MS. WILCOX: Judge, at this time the Respondent would submit this stipulation or this admission. He will stipulate to or admit that the acts and conduct set out in Count I did in fact occur as set out in that Count; but would argue that those acts and conduct do not constitute misconduct under the disciplinary rules.

For purposes of Count II, the acts and conduct set out in the Disciplinary Complaint in Count I are of the same nature. They are the same acts, so that this admission as to those acts is as set out in Count I and apply to those acts as they appear in Count II and he would again on Count II assert that those acts do not provide a basis for a finding of misconduct by way of fraudulent statement or misrepresentation upon his reinstatement.

THE COURT: Anything further?

MS. WILCOX: Nothing further, Judge.

THE COURT: With those admissions, does the Commission see any need to go ahead?

MR. COPENHAVER: Your Honor, it is my understanding that Count I, Paragraph 1 is admitted as alleged?

MS. WILCOX: He is admitting to the acts and conduct, which are alleged in Count I, which are asserted in Count I to comprise the basis for the charge of misconduct.

MR. OGDEN: We are defending ultimately on the constitutional issue, which we are not prepared to assert at this hearing. We are admitting that the conduct or speech took place only for the purpose of this hearing. We will present our full defense on the constitutional issues at the hearing scheduled for September the 14th. We are stipulating that the conduct or the speech charged in Count I did in fact occur, while reserving our defense. Is that clear?

MR. COPENHAVER: I have to know, I think it's clear, but I would ask you to look at the Verified Complaint.

MR. OGDEN: All right.

MR. COPENHAVER: Are you admitting, then, that in Count I, looking at rhetorical paragraph one, the first full paragraph, is there any part of that paragraph you would not admit to?

MS. WILCOX: Yes. Perhaps it might be easier if I were to read into the record what portions of each count we are admitting to, if that would be of assistance in clarifying.

THE COURT: All right. Go on.

MS. WILCOX: As to the rhetorical paragraph one, contained in Count I, the Respondent would admit that on numerous occasions, he has approached individuals in the hallways of the Marion County Municipal Courts, offered them unsolicited legal advice and offered his services as an attorney. He would further admit that this course of conduct includes, and that course of conduct refers specifically to what we have just admitted, that this course of conduct includes personally—

THE COURT: Would you slow it down a little? I am trying to take notes.

MS. WILCOX: He would further admit to the second paragraph of rhetorical paragraph one, that this course of

conduct, which would refer to the statement I just made which he would admit, includes personally soliciting the following named individuals at the following times. And we would admit to those individuals and those times contained in subpoints A through F.

As to Count I, he would further admit that as to A through F, in each of those instances, the Respondent, without invitation and without knowing the above-named individuals, approached said individuals in the hallways of the Marion County Municipal Courts, offered legal advice, suggested that they needed an attorney and stated that for a sum certain, he would represent said individuals in court.

The Respondent would further admit that his activity of soliciting clients in the above described manner, which we have just admitted, is a general course of conduct.

The Respondent would deny each and every allegation contained in rhetorical paragraph number two of Count I.

As to Count II, all of those admissions made for the purposes of Count I would apply.

We specifically deny all remaining allegations contained in Count II, with the exception that the statement alleged to have been made to the hearing officer at the second reinstatement hearing was made by the Respondent.

As to Count II, rhetorical paragraph number two, we would admit that a hearing was held on the second petition for reinstatement filed by the Respondent. At said hearing, the Respondent testified at length regarding the conduct for which he was disciplined as set out in paragraph one. We would admit that he repeatedly stated under oath that such conduct was contrary to the Code of Professional Responsibilities for attorneys of law.

THE COURT: I didn't understand about rhetorical paragraph three in Count II.

MS. WILCOX: I'm sorry, rhetorical paragraph number two in Count II.

THE COURT: Yes. Now we are down to Count III. I didn't get that—rhetorical paragraph three. I beg your pardon.

MS. WILCOX: I am still reading from rhetorical paragraph two. I am on the section underlined on Code of Professional Responsibility. He would admit that he would never engage in such conduct if reinstated in the practice of law and he would further admit to the conclusions and findings of fact contained in subpoint—rather, the indented portion bearing the heading "Number Nine," beginning with the word, "Petitioner," and concluding with the word, "remorseful," and all the intervening words therein.

He would further admit that on or about March 3rd, 1977, based in large part upon the above finding, the Indiana Supreme Court Disciplinary Commission recommended the Respondent reinstatement to the practice of law. We would admit that on or about March 16, 1977, the Respondent was reinstated to the practice of law by order of the Indiana Supreme Court.

We would admit the allegations contained in paragraph three of Count II.

We would deny each and every allegation contained in paragraph four of Count II.

And we would state for purposes of this hearing, that the admissions to which we have made and the conduct and acts alleged in both Count I and Count II of the Verified Complaint do not legally constitute sufficient grounds for finding of misconduct pursuant to the rules for the Commission to discipline attorneys for the State of Indiana.

MR. OGDEN: We would base that contention on the legal defenses asserted in our amended answers that were submitted to this tribunal this morning.

MS. WILCOX: We would ask to incorporate by reference those legal defenses raised as to Count I and Count II in our Answer for purposes of this hearing on the Rule

to show Cause. And with the incorporation of the legal points raised in our Answer, we would ask that we also incorporate the Memorandum of Law attached to the motion to reconsider filed today with this Court, and consider that in light of the statement here that we do not believe the acts and conduct to be shown to be acts of misconduct. We would then rest.

THE COURT: Anything further?

MS. WILCOX: Nothing further, Your Honor. We rest.

THE COURT: All right. You have rested. I assume the Disciplinary Commission has no further evidence to offer?

MR. COPENHAVER: We have one bit of further evidence, Your Honor, which I think could be offered by stipulation. In order for this Court to have jurisdiction, we must offer into evidence the Respondent's Oath of Attorneys to show that he is a member of the Bar of the State of Indiana.

MR. OGDEN: We have no objections to the admission of this evidence.

(Commission Exhibit Number One was marked for identification.)

MR. COPENHAVER: At this time, Commission would offer Commission's Exhibit One, being a certified copy of the Respondent's Oath of Attorney.

THE COURT: It will be admitted without objection.

MR. OGDEN: That is correct, Your Honor.

MR. COPENHAVER: At that, Your Honor, the Commission would stand upon its Verified Complaint previously filed in this cause and based upon the holdings of the Indiana Supreme Court in previous decisions, ask that the Respondent be temporarily, a finding that the Respondent be temporarily suspended be set in the Indiana Supreme Court. We rest.

THE COURT: All right. Thank you.

MS. WILCOX: Thank you, Your Honor.

MR. OGDEN: Thank you.

THE COURT: Again, if a day or two would make any difference, Ms. Wilcox, I will be glad to consider that on the date of the hearing of September 14.

MS. WILCOX: It might be that I can submit a Motion for a Continuance to the Judge before whom I have the trial at this time.

IN THE SUPREME COURT
OF THE
STATE OF INDIANA

IN THE MATTER OF
BIAGIO J. PERRELLO } CAUSE NO. 678 S 105

CERTIFICATE

This is to certify that the foregoing 21 pages constitute a true and correct transcript of the proceedings had upon the hearing of the above-entitled cause taken from my original and official stenotype notes taken in said cause.

s/ KATHLEEN ANDREWS
Notary Public

My Commission expires
March 31, 1979.

Marion County, county of
residence.

APPENDIX C

IN THE SUPREME COURT
OF THE
STATE OF INDIANA

IN THE MATTER OF
BIAGIO J. PERRELLO } CAUSE NO. 678 S 105

MOTION FOR SUSPENSION
PENDING PROSECUTION

The Disciplinary Commission of the Supreme Court of Indiana heretofore determined that the misconduct of the attorney named above, if proven, would warrant disciplinary action, and having directed its Executive Secretary to file the following Verified Complaint, now by its Executive Secretary, Sheldon A. Breskow, pursuant to A.D. Rule 23, Sections 11(c) and 14(g), Court Rules, Book 2, Ind.Ann.Stat. (1973), the Disciplinary Commission having heretofore determined that there is reasonable cause to believe Respondent is guilty of misconduct which, if proven, would warrant suspension pending prosecution, now moves the Court for an order to issue a rule against the Respondent, Biagio J. Perrello, heretofore admitted to the Bar of the State of Indiana on May 20, 1970, and maintaining an office for the practice of law in Indiaanpolis, Indiana, to show cause why he should not be suspended pending final determination of the cause and requests that the court fix a time and place for a hearing thereon, and requests that notice of such hearing be served on the Respondent by personal service or certified or registered mail, all pursuant to Section 14(g) of the above-cited rule of Court and said Executive Secretary now shows to the Court the following:

The Executive Secretary hereby incorporates by reference and makes a part hereof, and attaches

hereto the Verified Complaint for Disciplinary Action filed in the above case.

(H. I.)

WHEREFORE, the Executive Secretary prays that a rule to show cause issue against the Respondent attorney fixing a time and place for a hearing thereon and giving the required notice, and that subsequent to said hearing, the Respondent attorney be suspended pending final determination of this cause, and such other relief as is necessary and proper in the premises.

s/ SHELDON A. BRESKOW
Executive Secretary
Indiana Supreme Court
Disciplinary Commission

STATE OF INDIANA
COUNTY OF MARION } ss:

Sheldon A. Breskow, being duly sworn upon his oath, deposes and says that he is the Executive Secretary of the Disciplinary Commission of the Supreme Court of Indiana appointed pursuant to Ind. A.D. Rule 23, Section 8(a), Court Rules, Book 2, Ind.Ann.Stat. (1973); that he makes this affidavit as Executive Secretary of the Disciplinary Commission, and that the facts set forth in the above and foregoing Motion are true as he is informed and believes.

s/ SHELDON A. BRESKOW

Subscribed and sworn to before me, a Notary Public in and for said County and State, this 12th day of June, 1978.

s/ SHARON SCHOLL
Notary Public

My Commission Expires:
March 27, 1981

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing MOTION FOR SUSPENSION PENDING PROSECUTION was deposited in the United States Mail, First Class, Certified Mail, Return Receipt Requested, postage prepaid, addressed to the following:

Mr. Biagio J. Perrello
1424 Circle Tower Building
Indianapolis, Indiana 46204

this 12th day of June, 1978.

s/ SHELDON A. BRESKOW

IN THE SUPREME COURT
OF THE
STATE OF INDIANA

IN THE MATTER OF
BIAGIO J. PERRELLO } CAUSE NO. 678 S 105

VERIFIED COMPLAINT FOR DISCIPLINARY ACTION

The Disciplinary Commission of the Supreme Court of Indiana, having found reasonable cause to believe the Respondent's acts, if proven, would warrant disciplinary action, by its Executive Secretary, Sheldon A. Breskow, pursuant to Ind. R. A.D. 23, Section 12, files and presents this Verified Complaint for Disciplinary Action against Biagio J. Perrello heretofore admitted to the Bar of the State of Indiana on May 20, 1970. The Verified Complaint is as follows:

COUNT I

1. Since March 16, 1977, the Respondent has engaged in a general course of conduct which is contrary to and in

violation of the provisions of the *Code of Professional Responsibility for Attorneys at Law* in that on numerous occasions he has approached individuals in the hallways of the Marion County Municipal Courts, offered them unsolicited legal advice, and offered his services as an attorney.

This course of conduct includes, but is not limited to, personally soliciting the following named individuals at the following times:

A) During June and July 1977:
Michael J. Bates

B) On or about August 4, 1977:
Dennis Weiss
Bradley Ferguson
Puralee Bishop
Robert Miller

C) On or about September 29, 1977:
Kenneth Reals

D) On or about February 2, 1978:
Michael Elkins

E) During April, 1978:
Diana Barley

F) On or about May 5, 1978:
Jerry Dee Tarver

In each of the above stated instances the Respondent, without invitation and without knowing the above named individuals, approached said individuals in the hallway of the Marion County Municipal Courts, offered legal advice, suggested that they needed an attorney, and stated that for a sum certain he would represent said individuals in court.

The Respondent's activity of soliciting clients in the above described manner is a general course of conduct.

2. The Respondent has, by giving unsolicited advice to laymen, in person, to obtain counsel and recommending himself as a private attorney for such persons, and for accepting employment resulting from that advice, as stated in rhetorical paragraph 3, violated the following disciplinary rules found in the *Code of Professional Responsibility for Attorneys at Law:* D.R. 2-103(A) and D.R. 2-104(A).

COUNT II

1. On or about May 1, 1973, the Indiana Supreme Court in an opinion entitled *In Re Perrello,* — Ind. —, N.E.2d — (1973), written by then Chief Justice Norman Arterburn, found the Respondent, Biagio J. Perrello, was guilty of professional misconduct. The Court, by adopting the Hearing Officer's findings, stated:

> 14. While attorneys are customarily in the public corridors of the City-County Building of Marion County adjacent to the Municipal Courtrooms, it is not common practice for them actively to solicit business in violation of the Canons of Ethics.
>
> 15. The Respondent is prone to approach total strangers and initiate conversations with them.
>
> • • •
>
> 18. Mr. Perrello has engaged in the practice of advising laymen who were not his clients that they were in need of legal counsel.

From the above facts the Court concluded the following:

> To conclude that Mr. Perrello has not unethically solicited business would require the Court totally to ignore the evidence brought forward by the Disciplinary Commission, and for that matter, some of the evidence volunteered by the Respondent's witnesses. The Respondent's testimony in denial of the charges against him lacks credibility when

weighed against the statement of impartial bystanders who stand no opportunity for gain or loss by the result of these proceedings.

The Hearing Officer concludes from the evidence that the Respondent, Biagio J. Perrello, is guilty of professional misconduct in violation of Disciplinary Rule 2-103(A), Disciplinary Rule 2-104(A)(1), and Disciplinary Rule 1-102(A)(1), (4), and (6).

The Court, having found the above misconduct, suspended the Respondent from the practice of law for a period of not less than two (2) years.

2. On or about November 18, 1978, a hearing was held on the second Petition for Reinstatement filed by the Respondent. At said hearing the Respondent testified at length regarding the conduct for which he was disciplined as set out above in paragraph one. He repeatedly stated, under oath, that such conduct was contrary to the *Code of Professional Responsibility for Attorneys at Law,* injurious to the public and bar, and that he would never engage in such conduct if reinstated to the practice of law. This testimony led the hearing officer to conclude:

> 9. Petitioner testified in this case at some length. He recounted his experience in the practice from the time he was admitted in 1970 to the present. He feels that he got a wrong impression about the seriousness with which lawyers took the Canon forbidding the solicitation of business. He observed other lawyers soliciting business. He was advised by other lawyers to hang around courts to try to get business. These experiences caused him to feel that this was the way the system worked. He has been a court clerk and a Deputy Prosecutor, and in private practice he was involved in over two hundred (200) cases in Municipal and Criminal Courts. Petitioner admitted that at first he did not feel he

> should have been penalized, because the practice of soliciting was widespread. He has come to realize that the Canons of Ethics are a necessary and desirable thing for the profession, and that the welfare of the public and the profession require that they be strictly enforced.
>
> He is not hostile or resentful about his punishment but is remorseful.

On or about March 3, 1977, based in large part upon the above finding, the Indiana Supreme Court Disciplinary Commission recommended the Respondent's reinstatement to the practice of law.

On or about March 16, 1977, the Respondent was reinstated to the practice of law by order of the Indiana Supreme Court.

3. The Respondent has, since the time of his reinstatement, engaged in a course of conduct the same as that for which he originally was disciplined.

4. The Respondent by stating to the hearing officer of the Indiana Supreme Court Disciplinary Commission that he would not attempt to solicit business in the future and was truly remorseful for having done so in the past, attempted to and did deceive said hearing officer and the Indiana Supreme Court. Said misrepresentation was designed to gain readmission to the practice of law. In so doing the Respondent engaged in conduct involving dishonesty, fraud, deceit, and misrepresentation further it adversely reflects upon his fitness to practice law and has violated the following disciplinary rules found in the *Code of Professional Responsibility for Attorneys at Law:* D.R. 1-102(A)4 and 6.

WHEREFORE, the Executive Secretary prays that the said Biagio J. Perrello be disbarred or otherwise disciplined as warranted for professional misconduct, and that Respondent be ordered by the Court to pay such expenses

to the Clerk of the Court as shall be prepared and submitted to the Court by the Executive Secretary as an itemized statement of expenses allocable to this case incurred in the course of investigation, hearing and review procedures, pursuant to Ind. R. A.D. 23, Section 16.

s/ SHELDON A. BRESKOW
Executive Secretary
Indiana Supreme Court
Disciplinary Commission

STATE OF INDIANA
} SS:
COUNTY OF MARION

Sheldon A. Breskow, being duly sworn upon his oath, deposes and says that he is the Executive Secretary of the Disciplinary Commission of the Supreme Court of Indiana appointed pursuant to Ind. R. A.D., Sec. 8(a); that he makes this affidavit as Executive Secretary of the Disciplinary Commission, and that the facts set forth in the above and foregoing Verified Complaint for Disciplinary Action are true as he is informed and believes.

s/ SHELDON A. BRESKOW

Subscribed and sworn to before me, a Notary Public in and for said County and State, this 12th day of June, 1978.

s/ SHARON SCHOLL
Notary Public

My Commission Expires:
March 27, 1981

Indiana Supreme Court
Disciplinary Commission
150 West Market Street
814 I.S.T.A. Building
Indianapolis, Indiana 46204
(317) 633-4454

CERTIFICATE OF SERVICE

CAUSE NO. ————

The undersigned hereby certifies that a copy of the foregoing VERIFIED COMPLAINT FOR DISCIPLINARY ACTION was deposited in the United States Mail, First Class, Certified Mail, Return Receipt Requested, postage prepaid, addressed to the following:

MR. BIAGIO J. PERRELLO
Attorney at Law
1424 Circle Tower Building
Indianapolis, Indiana 46204

this 12th day of June, 1978.

s/ DAVID L. COPENHAVER

Supreme Court, U. S.
FILED
JAN 2 1979
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-864

BIAGIO J. PERRELLO, PETITIONER
v.
THE INDIANA SUPREME COURT DISCIPLINARY COMMISSION

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

PETITIONER'S BRIEF IN REPLY

WILLIAM E. MARSH,
Esquire
735 West New York Street
Indianapolis, Indiana 46202
RALPH OGDEN,
Esquire
3540 North Pennsylvania
Indianapolis, Indiana 46205
M. ANNE WILCOX,
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800 Circle Tower Building
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

NO. 78-864

BIAGIO J. PERRELLO, Petitioner

v.

THE INDIANA SUPREME COURT DISCIPLINARY COMMISSION, Respondent

---

PETITIONER's BRIEF IN REPLY

In its Brief in Opposition, the respondent appears to raise three issues: (1) That petitioner's claim is not justiciable because he stipulated to certain factual allegations; (2) That petitioner's claim is without merit because the sole requirements of due process are notice that a hearing will be held and an opportunity for petitioner to be heard at that hearing; and (3) That

the procedures under which petitioner was suspended from the practice of law are analagous to the procedures set forth in this Court's Rule 8, and are not therefore unconstitutional. These arguments are refuted below.

Petitioner did admit to some of the factual allegations in the complaint against him. He also specifically alleged that the Indiana Supreme Court could not constitutionally shift the burden of proof to him, and that it could not, as a matter of constitutional law, prohibit the conduct alleged in the complaint. On the basis of a partially stipulated record and petitioner's legal defenses, the Supreme Court of Indiana suspended him from the practice of law because he "failed in his burden of proof of establishing why he should not be suspended..." In re Perrello, ___ Ind. ___, 380 N.E.2d 72 (1978). The Court thus stated unequivocally that its decision was based upon petitioner's failure to sustain his burden of proof. It is this legal basis for his suspension that petitioner is challenging in his petition for certiorari; he is not seeking

a review of the factual determinations made by the Hearing Officer or by the Supreme Court of Indiana. Petitioner has sustained a serious injury in fact because of his suspension and contends that the procedures under which that suspension was imposed are constitutionally defective. Petitioner's injury is a continuing one because the suspension remains in effect. His only relief is for this Court to grant his petition for certiorari and then reverse the Supreme Court of Indiana. The controversy is now, and always has been, a live one.

Respondent implies that merely by advising petitioner of the charges against him, and by giving him "an opportunity to be heard", due process is satisfied. This argument completely misconstrues this Court's decisions on the scope and application of the due process clause. Notice and hearing are essential but not sufficient. Due process is a flexible concept that is given substance in accord with the particular situation in which it is required. As this Court held in Goldberg v. Kelly, 397 U.S. 254, 263, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970):

> "The extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be 'condemned to suffer grievous loss,' Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 168, 71 S.Ct. 624, 95 L.Ed. 817 (1951) (Frankfurter, J., concurring), and depends upon whether the recipient's interest in avoiding that loss outweighs the governmental interest in summary adjudication."

The allocation of the burden of proof is one element of due process. By applying the balancing test set forth in Goldberg v. Kelly, supra, it is apparent that petitioner has a much greater interest in avoiding the suspension that the respondent has in a summary adjudication. Generally, the burden of proof cannot be shifted by the government to a responding party, Petition for Certiorari, p. 6 et seq. Petitioner has suffered a substantial injury because he was required to sustain the burden of proof in the trial below and failed to do so. Respondent has offered no

justification for requiring petitioner to prove that he should not be suspended. In failing to do so, respondent tacitly admits that no such justification exists.

The remainder of respondent's arguments that the rules and procedures challenged by the petitioner satisfy due process requirements have been refuted in the petition for certiorari.

Respondent suggests that when a rule to show cause is issued under Supreme Court Rule 8, the burden of proof is shifted to the responding attorney in the same manner that the burden of proof was allocated to the petitioner in the trial below. This is wholly inaccurate. Rule 8 first requires proof of the ground for disbarment. The burden of going forward with the evidence is then placed on the attorney. To avoid disbarment, he must refute the charges or show why, in spite of his misconduct, he should not be disbarred. This follows the rule for civil trials. In the trial below, however, the respondent did nothing more than charge the petitioner with misconduct. Petitioner was then required to do far more than go forward with the evidence. While

it is not exactly clear what he was required to prove in order to avoid being suspended, it is clear that he had the burden of proving that he should not be suspended.

CONCLUSIONS

In summary, respondent has not made one valid argument for denying the petition for a writ of certiorari. For the reasons set forth in the original petition, a writ of certiorari should issue to review the judgment and opinion of the Supreme Court of Indiana in this cause.

Respectfully submitted,

William E. Marsh, Esq.

Ralph Ogden, Esq.

M. Anne Wilcox, Esq.

CERTIFICATE OF SERVICE

I hereby certify that on this 2ND day of JANUARY, 1979, three copi copies of Petitioner's Brief in Reply were hand delivered to Mr. Sheldon A. Breskow, Attorney for the Respondent, at 814 I.S.T.A. Building, 150 West Market Street, Indianapolis, Indiana 46204. I further certify that all parties required to be served have been served.

William E. Marsh, Esq.